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709-361—63——1

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 69

LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL., APPELLANTS

v.

HARRISON MANN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (R. 57–79) is reported at 213 F. Supp. 577.

JURISDICTION

The order of the district court was entered on November 28, 1962 (R. 79). The notice of appeal to this Court was filed on December 10, 1962, and probable jurisdiction was noted on June 10, 1963 (R. 81, 83). The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the federal district court, instead of deciding the constitutionality of the apportionment of Virginia's legislature under the Fourteenth Amendment, should have either dismissed or stayed the proceedings to allow a suit to be brought in a State court in order to decide State issues.

2. Whether the apportionment of the Virginia legislature violates the equal protection clause because it discriminates against voters in Arlington and Fairfax Counties and the City of Norfolk without rhyme or reason.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sections 40 to 43 of Article IV of the Constitution of Virginia are set forth in Appendix A, p. 51. Chapters 635 and 638 of the Virginia Acts of Assembly for 1962 are set forth in Appendix A, pp. 51–56. Sections 17–19 and 23.1 of 24 Virginia Code are set forth in Appendix A, pp. 56–58.

INTEREST OF THE UNITED STATES

This is one of four cases pending argument on the merits in which the Court will be called upon to formulate under the Fourteenth Amendment the constitutional principles applicable to challenges to malapportionment of a State legislature. The United States has filed its principal brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, because that case presents a greater variety of issues. There, we presented a compendious analysis of the substantive issues in all four cases showing their relation to each other. Substantively, the instant case raises the specific problem of the validity of discrim-

ination in *per capita* representation against the citizens of three areas without any rational justification whatever. Procedurally, the instant case raises questions concerning the relationship between federal and State forums in the adjudication of such constitutional issues.

Individually and collectively, these cases present issues of great importance to millions of American citizens seeking full and fair participation in their State governments. This is the primary basis of the government's interest.

STATEMENT

The plaintiffs—four citizens of the United States and of the Commonwealth of Virginia, who are residents and qualified voters of Arlington and Fairfax Counties—filed a complaint on April 9, 1962, in the United States District Court for the Eastern District of Virginia, in their own behalf and on behalf of all voters in Virginia similarly situated, challenging the apportionment of the Virginia legislature. (R. 1–31). The defendants, who were sued in their representative capacities as officials charged with duties in connection with State elections, include the Governor and Attorney General of Virginia; three members of the Virginia Board of Elections; the three members of the Electoral Boards of Fairfax and Arlington Counties, as representatives of all members of city and county electoral boards of Virginia; and the Clerks of the Circuit Courts of Arlington and Fairfax Counties, as representatives of all of the county and city clerks of Virginia (R. 1, 3–4). The plaintiffs claimed rights under the Civil Rights Act, 42 U.S.C. 1983, 1988, and asserted jurisdiction under 28 U.S.C. 1343(3) (R. 2).

The complaint alleged that the present statute apportioning the General Assembly, as amended in 1962, results in "invidious discrimination" since voters in Arlington and Fairfax Counties are given substantially less representation than voters residing elsewhere in the State (R. 6–7). The plaintiffs asserted that the discrimination violates the Fourteenth Amendment as well as the Virginia Constitution. They contended that the requirements of the Fourteenth Amendment and the Virginia Constitution could be met only by a re-distribution of legislative districts among the counties and cities of the State "substantially in proportion to their respective populations" (R. 7–8).

The complaint sought the convening of a three-judge district court. As relief, plaintiffs asked: (1) a declaratory judgment that the statutory scheme of reapportionment, prior as well as subsequent to the 1962 amendments, contravenes the equal protection clause of the Fourteenth Amendment and is, therefore, unconstitutional and void; (2) a prohibitory injunction restraining the defendants from performing their official duties with respect to the election of members of the General Assembly pursuant to the present statute; and (3) a mandatory injunction requiring the defendants to conduct the next primaries and general election for legislators on an at-large basis throughout Virginia (R. 8–9).

1. *The Pre-hearing Proceedings in the District Court.* On April 17, 1962, the Chief Judge of the Court of Appeals for the Fourth Circuit convened a three-judge district court. Four citizens of the United States and Virginia, who are residents and

qualified voters of the City of Norfolk, moved on May 25, 1962, to intervene as intervenor-plaintiffs against the original defendants and against four additional defendants, namely, the Clerk of the Corporation Court for the City of Norfolk and the three members of the Electoral Board of Norfolk (R. 32–43). The application set out the substance of the allegations and grounds contained in the complaint and sought the same relief from the court which the plaintiffs were seeking (R. 36–43). The application was granted (see R. 58). On June 20, 1962, the plaintiffs and intervenor-plaintiffs sought and obtained leave to amend the complaint by adding an additional prayer for relief that, unless the General Assembly "promptly and fairly" reapportioned the legislative districts, the court should reapportion the districts so as to accord the parties and others similarly situated "fair and proportionate" representation in the legislature (R. 55).[1]

2. *The Evidence Before the District Court.* The Virginia Constitution provides for a Senate of not more than 40 nor less than 33 members, and for a House of Delegates of not more than 100 nor less than 90 members. Art. IV, Sec. 41, 42 (see Appendix A., p. 51). At all relevant times, State statutes have fixed the number of senators at 40 and of delegates at 100. The constitution also specifies that a reapportionment must be made at least once every ten years (Art. IV, Sec. 43). The constitution provides

[1] The plaintiffs introduced into evidence two alternate plans for reapportioning the House of Delegates (R. 105–114, 119–131) and three alternate plans for the redistricting of the Senate (R. 133–158).

no express standards, however, for the apportionment of representatives and it also leaves the establishment of the districts to legislation.

The core of the evidence before the district court is the basic figures showing the population of the several districts from which senators and delegates are chosen and the number of senators and delegates assigned to each. The most convenient tabulation appears at R. 11–24. From that data other statistical comparison were derived. Since the 1962 apportionment was enacted only two days before the complaint was filed and made only a small change in Virginia Code 24–12, 14, which had been last amended in 1958, the evidence covers both the present and last previous apportionments.

Although the conclusions to be derived from the data are matters of argument, the basic figures make it abundantly clear that the people of Arlington and Fairfax Counties and the City of Norfolk suffer from gross inequalities in *per capita* representation in both houses of the Virginia legislature. Since there are 40 senators and Virginia had a population of 3,966,949, according to the 1960 census, the ideal ratio would be one senator for 99,174 people. Arlington County has only one senator for 163,401 people—only 61 percent of its fair representation. Its voters are the most underrepresented in the State. The City of Norfolk has only 65 percent of its fair share—two senators for a population of 305,872—making it the second most underrepresented senatorial district. Fairfax, with two senators for 285,194 people, is the third worst represented area with only 70 percent of a fair apportionment.

The inequality is also apparent from the following table showing the Arlington, Fairfax and Norfolk districts in comparison with the most overrepresented districts as well as other typical areas (R. 18–20):

Senatorial district	Total population (1960)	Number of Senators	Population per Senator	Ratio to most underrepresented district
Arlington	163,401	1	163,401	1.00
City of Norfolk	305,872	2	152,936	1.00
Fairfax				
City of Fairfax	285,194	2	142,597	1.14
Falls Church				
City of Richmond	219,958	2	109,979	1.58
City of Alexandria	91,023	1	91,023	1.79
Henry				
Patrick				
Pittsylvania				
City of Danville	179,288	2	89,644	1.82
City of Martinsville				
Bland				
Giles				
Pulaski	72,434	1	72,434	2.25
Wythe				
Culpepper				
Fauquier				
Loudoun	63,703	1	63,703	2.86
Brunswick				
Lunenburg				
Mecklenburg	61,730	1	61,730	2.64
State total	3,966,949	40	99,174	1.65

Thus, the ratio between the most overrepresented and the most underrepresented districts is more than 2½ to 1. Twelve districts have over twice the representation of Arlington County; ten have over twice the representation of Norfolk; and six have over twice the representation of Fairfax.[18]

The same discrimination against the people of Arlington and Fairfax Counties and the City of Nor-

[18] In making such calculations, we have considered overlapping districts as one large district. For example, under the apportionment before 1962, Amhurst County (population 22,953) and the City of Lynchburg (population 54,790) together had a delegate, Lynchburg alone had a delegate, and Nelson (population 12,752) and Amhurst Counties had a delegate. We have considered all three as composing one district with a population of 90,595 and three delegates.

folk is apparent in the figures relating to the House of Delegates. Fairfax, the third most underrepresented district in the Senate, is the most underrepresented in the House of Delegates, having only 42 percent of the ideal representation. Arlington, the most underrepresented district in the Senate, is the fifth most underrepresented district in the House, with only 73 percent of its fair share. The City of Norfolk is the sixth most underrepresented district in the House of Delegates, with 78 percent of its fair representation.

The discrimination in the House of Delegates is also apparent from the following table comparing Arlington and Fairfax Counties and the City of Norfolk with the most overrepresented districts and other typical districts (R. 21–24):

House district	Total population (1960)	Number of delegates	Population per delegate	Ratio to most underrepresented district
Fairfax County City of Fairfax City of Falls Church	285,194	3	95,064	1.00
Chesterfield City of Colonial Heights	80,784	1	80,784	1.17
Arlington	163,401	3	54,467	1.74
City of Norfolk	305,872	6	50,978	1.86
City of Newport News	113,662	3	37,887	2.50
Lee Wise City of Norton	74,416	2	37,208	2.55
City of Petersburg Dinwiddie	58,933	2	29,466	3.22
Pittsylvania	58,296	2	29,148	3.26
Rockingham City of Harrisonburg	52,401	2	26,200	3.62
Loudoun	24,549	1	24,549	3.87
Bland Giles Grayson City of Galax	22,644	1	22,644	4.19
Wythe	21,975	1	21,975	4.32
Shenandoah	21,835	1	21,835	4.35
State total	3,966,949	100	39,669	2.40

Excluding Arlington, Norfolk, and several pertinent overlapping districts (see note 1a, p. 7), every district except six has more than twice the representation of the people of Fairfax. Twenty-seven districts have more than three times the representation of the people of Fairfax. The ratio between Fairfax and the four most overrepresented districts is more than 4 to 1. Twelve districts had twice the representation of Arlington, and six, twice that of Norfolk.

The evidence also showed that measured simply by the percentage of the population required to elect a majority in each house of the legislature, Virginia ranks well up on the list of well-apportioned States. It requires just under 40 percent of the population to elect majorities in both the Senate and House of Delegates.

3. *The Decision and Decree of the District Court.* On November 28, 1962, the district court, one judge dissenting, sustained the plaintiffs' claim and entered an interlocutory order (R. 57–80). In an opinion by Judge Bryan, concurred in by Judge Lewis, the court held that the complaint alleged a claim upon which relief could be granted; that the complaint pleaded a class action and an actual controversy within the Declaratory Judgment Act; and that the action was not barred by the 11th Amendment as one by private citizens against a State (R. 57–59).[2] The court refused to stay the case on the ground that the plaintiffs should first procure the views of the State courts on the validity of the apportionment, holding that since

[2] The court sustained motions to dismiss the suit as to the Governor and Attorney General, holding that those officials had no "special relation" to the elections in question (R. 59).

neither the 1962 legislation nor the State constitution was ambiguous, no question of State law requiring abstention was presented.

In applying the equal protection clause, the court ruled, although population is the "predominant" consideration, other factors including "[c]ompactness and contiguity of the territory, community of interests of the people, observance of natural lines, and conformity to historical division * * * are all to be noticed in assaying the justness of the apportionment" (R. 65). While exactitude in population is not constitutionally required, the court said, "there must be a fair approach to equality unless it be shown that other acceptable factors may make up for the differences in the numbers of people" (R. 66). In view of the gross inequalities in representation in Virginia (see pp. 6–9 above), the court put the burden of explanation upon the defendants but found that they failed to meet it; consequently, the court concluded that the discrimination against Norfolk City and Arlington and Fairfax Counties was invidious and violates the equal protection clause of the Fourteenth Amendment (R. 67).

As for relief, the court said that, while it would have preferred for the General Assembly to correct the unconstitutionality of the 1962 legislation, it would not defer the case until the next regular session of the General Assembly in January 1964, because the delegates to be elected in 1963 would hold office until 1966 and the senators to be elected in 1963, until 1968 (R. 67–68), which would cause "unreasonable" delay in correcting the injustices in the House and Senate (R. 68).

The interlocutory order (1) declared that the 1962 apportionment violated the equal protection clause of the Fourteenth Amendment and accordingly was void and of no effect; (2) restrained and enjoined the defendants from proceeding under the 1962 legislation, but stayed the operation of the injunction until January 31, 1963, so that either the General Assembly could act or an appeal could be taken to this Court; (3) provided that, if neither of these steps were taken, the plaintiffs might apply to the court for further relief; and (4) retained jurisdiction over the cause for the entry of such orders as may be required (R. 80).

Judge Hoffman dissented both on the merits of plaintiffs' claim and on the question of relief and procedure (R. 68–79). On the merits, he said that he was not prepared to say that the discrimination under the 1962 legislation violated the Fourteenth Amendment "in the absence of further guidance" from this Court or the Virginia Court of Appeals (R. 69). He said that the majority decision "place[d] too much emphasis upon the weighted vote of one county, city, or district as contrasted with the weighted vote in another county, city or district" (R. 69). On the question of relief and procedure, Judge Hoffman favored application of the doctrine of abstention, at least until the plaintiffs should have exhausted their remedies in the State courts (R. 70, 74–78).

The defendants noted an appeal on December 10, 1962, to this Court (R. 81–83). The Chief Justice granted a stay of the injunction pending disposition of the case by this Court.

ARGUMENT

INTRODUCTION AND SUMMARY

The instant case raises a threshold question not presented in the companion cases. The district court refused defendants' request that it abstain from deciding the basic issues under the federal Constitution so that they could be litigated in the State courts, and that ruling is questioned on appeal.

We submit that ruling was correct. The federal courts have power to determine suits challenging the constitutionality of a State's legislative apportionment. *Baker* v. *Carr*, 369 U.S. 186. A federal action over which the court has jurisdiction is not to be dismissed merely because an alternative remedy may be available under State law in the State courts. *E.g., Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 27. In this case there are no State issues to be resolved before reaching the federal question, nor is the constitutional right asserted by the plaintiffs "entangled in a skein of state law that must be untangled before the federal case can proceed." *McNeese* v. *Board of Education*, 373 U.S. 668, 674. The Virginia statute is precise on its face. Plaintiffs' claim is predicated upon the Fourteenth Amendment. Therefore, the district court not only had discretion but the duty to decide the case.

Our basic analysis of the constitutional standards to be applied in adjudicating challenges to the constitutionality under the Fourteenth Amendment of an apportionment of seats in a State legislature is set forth in the Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No.

29, this Term.[3] Here, we predicate that the Fourteenth Amendment imposes substantive limitations upon State legislative apportionment, as urged in that brief (pp. 26–29).

We show below that the apportionment of the Virginia legislature violates the second proposition advanced in our Maryland brief (pp. 34–39)—that the equal protection clause condemns gross inequalities in *per capita* representation that have no rhyme or reason. We submit that the people of Fairfax and Arlington Counties and of the City of Norfolk have been capriciously denied anything approaching equal representation in either house of the Virginia legislature. Since these areas contain a substantial part of the population, the discrimination cannot be brushed aside as the kind of trifling inequality that sometimes emerges in the operation of an essentially fair system. The only justifications suggested, in fact, fail to explain the invidious discrimination. Even if appellants' figures concerning military personnel and their dependents were acceptable, they would not support the relatively inadequate representation accorded to Arlington and Fairfax Counties. Nor can the discrimination be explained as an attempt to balance urban and rural power. Other urban areas, such as the City of Richmond, are given appropriate representation.

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[3] The analysis, as stated in our Maryland brief, proceeds on the assumption that the Fourteenth Amendment permits reasonable deviations from equal *per capita* representation in at least one house of the legislature. The assumption is made *arguendo*, reserving further judgment, because the issue does not have to be decided in the present cases.

I

THE DISTRICT COURT CORRECTLY PROCEEDED TO AN ADJUDICATION OF PLAINTIFFS' CONSTITUTIONAL CLAIMS

The district court had jurisdiction of the subject matter of the present action. The plaintiffs, who as individual voters were the victims of the discrimination against the people of Arlington and Fairfax Counties and of the City of Norfolk, had standing to bring the action. The federal question raised by the complaint is justiciable. All three points were settled beyond dispute in *Baker* v. *Carr*, 369 U.S. 186. Appellants' argument is that the federal court should have dismissed the complaint because the issues had not first been litigated in the State courts, and in this connection appellants point to the suit entitled *Tyler* v. *Davis* in a State court (see Appellants' Brief, pp. 26–27), which was instituted *after* the decision below, raising the same questions. We submit that there was no occasion for the district court to postpone adjudication and that, in any event, it would have been error to dismiss the complaint.

A. THE DISTRICT COURT PROPERLY REFUSED TO POSTPONE AN ADJUDICATION PENDING A STATE DETERMINATION OF THE ISSUES

Where a federal court has jurisdiction of an action arising under the Constitution of the United States, it is the court's duty to proceed promptly to a final adjudication without deferring to State courts unless some recognized ground of abstention appears. Only two grounds have any possible relevance in the present case.

1. Where the meaning of a State statute or other State action is uncertain, and therefore its constitutionality cannot be determined until the State has given its action definitive meaning, the federal proceeding may be suspended for a reasonable period pending clarification of the question of State law in a State court. The reason for the rule is that the federal courts will not anticipate a constitutional controversy by adjudicating the validity of State action upon a hypothetical interpretation. *E.g., Government and Civic Employees Organizing Committee* v. *Windsor*, 353 U.S. 364, 366; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 171–172; *Spector Motor Service, Inc.*, v. *McLaughlin*, 323 U.S. 101, 104–105; *American Federation of Labor* v. *Watson*, 327 U.S. 582, 596; *Albertson* v. *Millard*, 345 U.S. 242, 244; *Harrison* v. *National Association for the Advancement of Colored People*, 360 U.S. 167.

This ground of abstention is obviously inapplicable to the present case, even if *Harrison* v. *National Association for the Advancement of Colored People*, *supra*, be thought to make the doctrine applicable to cases under the Civil Rights Act involving an antecedent question of State law. Plaintiffs' claims under the Fourteenth Amendment require no preliminary interpretation of the State legislation or of the significance of executive action. As both the majority and dissenting judges in the court below agreed (R. 59, 76), the Virginia apportionment statute is clear on its face. It defines exactly each legislative district. It assigns specific numbers of representatives to each

district in the Senate and House of Delegates. There is no room for interpretation. Consequently, there is no justification for abstention. *Toombs* v. *Fortson*, 205 F. Supp. 248, 253 (N.D. Ga.); *Moss* v. *Burkhart*, U.S.D.C., W.D. Okla., decided July 17, 1963; *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220, 233 (D. Hawaii).[4]

2. The Court has also held that where the State action challenged in a federal court may be illegal under the State's own law, either statutory or constitutional, then the federal court should suspend action until proceedings in the State courts reveal whether there is need to decide the federal constitutional question. The rule is based partly upon the principle that the federal courts should not adjudicate constitutional questions unless their resolution is unavoidable, and partly upon the desirability of avoiding unnecessary conflict between the federal courts and State governments. *Government and Civic Employees Organizing Committee* v. *Windsor*, 353 U.S. 364, 366; *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 498, 500–501; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 171–172; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 104–105. The doctrine is inapplicable to the present case, however, first, because the action is one under the Civil Rights Act and, second, because

[4] Numerous other federal courts have considered the constitutionality of State apportionments without finding even the necessity of alluding to this question. See the federal cases cited in the government's brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 26–27. Only one court has held to the contrary. *Lein* v. *Sathre*, 201 F. Supp. 535, 536 (D.N.D.).

there is no serious doubt about the validity of Virginia's apportionment under the Virginia Constitution.

It would defeat the basic purpose of the Civil Rights Act to hold that a federal court must temporarily deny a plaintiff his civil rights under the federal Constitution because he may also have a plausible claim that the defendant's action is violating State law. The very purpose of the legislation is to protect the basic constitutional rights of American citizens against State infringement. Where the challenged State action is ambiguous, it may be reasonable to require the plaintiff initially to ascertain the precise meaning of the State action so as to show that his constitutional rights are actually being violated, and to spare the court the danger of making an unnecessary ruling upon a false hypothesis. Cf. *Harrison* v. *National Association for the Advancement of Colored People,* 360 U.S. 167. But where the nature of the alleged wrong is clearly established, it is no answer to the plaintiff to say that perhaps he has a different remedy in another forum. This Court stated in *Monroe* v. *Pape,* 365 U.S. 167, 183, after a lengthy analysis of the legislative history of the Civil Rights Act—

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

A requirement of abstention, whenever State action might violate State law would produce long delays[5] and add greatly to the cost of vindicating federal constitutional rights. Litigants would be required to proceed not only in the district courts and then to this Court by direct appeal, but to the district court, to the State trial court and one or more State appeal courts, and then either to this Court directly[6] or to the federal district court and then to this Court. The result is likely to be the defeat of important constitutional rights in voting, racial segregation, and numerous other fields for a considerable period of time or, in practice, often forever.[7] The only alterna-

[5] For example, this Court decided that the district court should have abstained in *Harrison* v. *National Association for the Advancement of Colored People*, *supra*, in June 1959. A suit was then brought in the State courts, which upheld the constitutionality of the statutes. This Court ultimately reversed and held that the statute violated the Fourteenth Amendment in *National Association for the Advancement of Colored People* v. *Button*, 371 U.S. 415, in January 1963, nearly four years after the determination to abstain was first made.

[6] This Court has reviewed cases on direct appeal from the highest State court, after a federal district court has abstained merely to allow the State courts to decide State issues while retaining jurisdiction. *National Association for the Advancement of Colored People* v. *Button*, *supra*; *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45. As a result, the jurisdiction conferred by the Civil Rights Acts on the federal district courts to decide federal constitutional questions in the first instance may be entirely defeated.

[7] "The King of Brobdingnag gave it for his opinion that, 'whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicans put together.' In matters of justice, however, the benefactor is he who makes

tive would be for voters to bring apportionment issues in the State courts—a course which would defeat the purpose of the Civil Rights Acts to provide a federal forum for the assertion of constitutonal rights.

The recent decision in *McNeese* v. *Board of Education*, 373 U.S. 668, confirms the view that abstention is not required in cases brought under the Civil Rights Act where the sole State issue is the constitutionality of the State statute under State law. This Court refused to order a federal district court to abstain in a case brought under the Civil Rights Act on the ground that segregation in an Illinois public school might violate State law, saying that it would defeat the purposes of the Act to hold that the assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a State court. *Id.* at 672. Summarizing its view of the applicable law, the Court stated (*id.* at 674):

> The right alleged is as plainly federal in origin and nature as those vindicated in *Brown* v. *Board of Education*, 347 U.S. 483. Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed. For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. *Monroe* v. *Pape* * * *. Such claims are entitled to be adjudicated in the federal courts.

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one lawsuit grow where two grew before." Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297.

Earlier, in *Lane* v. *Wilson*, 307 U.S. 268, 274, the Court likewise said in a case under the Civil Rights Act that "resort to a federal court may be had without first exhausting the judicial remedies of state courts."

Numerous lower federal courts have also held that persons claiming rights under the Civil Rights Act need not proceed first in the State courts to determine whether the State conduct violates the State's own law. *Browder* v. *Gale*, 142 F. Supp. 707, 713 (M.D. Ala.), affirmed, 352 U.S. 903, involved statutes and ordinances requiring segregation of buses in Montgomery, Alabama. The district court refused to abstain to allow a State court to determine either the construction or validity of the statutes and ordinances involved because the doctrine of abstention "has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts." In *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220, 233 (D. Hawaii), the district court refused to abstain in a case challenging the apportionment of the Hawaii legislature even though it stated that the apportionment plainly violated the Organic Act. While the court believed that abstention was proper where interpretation of local law could avoid a constitutional question, it said that otherwise a plaintiff may litigate in a federal court even though a local court could grant effective relief. *Ibid.* In *Romero* v. *Weakley*, 226 F. 2d 399, 400–402, the Ninth Circuit noted that the California constitution had the same

provisions as the federal prohibiting racial segregation of public schools. The court nonetheless said that the plaintiffs were entitled to an adjudication under the federal Constitution since the "obvious purpose of the civil rights legislation [was] to give the litigant his choice of a federal forum rather than of the state." *Id.* at 401. Accord, *e.g.*, *Westminster School Dist.* v. *Mendez*, 161 F. 2d 774, 781 (C.A. 9); *Mitchell* v. *Wright*, 154 F. 2d 924, 926 (C.A. 5); *Stapleton* v. *Mitchell*, 60 F. Supp. 51, 55 (D. Kansas), appeal dismissed *sub nom. McElroy* v. *Mitchell*, 326 U.S. 690; *Wilson* v. *Beebe*, 99 F. Supp. 418, 420–421 (D. Del.).

The decision below would be correct even if the abstention doctrine applied in an apportionment case brought under the Civil Rights Act because, in the present case, there is no substantial claim that the Virginia apportionment deprives the plaintiffs of rights secured by Virginia law. At one point the complaint does allege that the apportionment violates both the Fourteenth Amendment and the Virginia Constitution (R. 7–8), but the reference follows two allegations confined to violation of the Fourteenth Amendment (R. 4, 6), and the complaint cites no provision of the Virginia Constitution that is said to be violated. The prayer for relief asks only that the district court declare the apportionment invalid under the Fourteenth Amendment (R. 8–9). The district court construed the complaint not to assert rights under the State constitution, for it described the issue as one arising solely under the Fourteenth Amendment (R. 57–58).

There is no apparent ground on which the apportionment could be held invalid under the Virginia Constitution. Virginia's constitution establishes no standards for apportionment of the legislature. The only provision fixes the maximum and minimum number of members in each house and states when they should be elected. Article IV, Sec. 40–41, Appendix A, p. 51. While appellants rely (Br. 24) on Article IV, Sec. 43 (Appendix A, p. 51), it merely provides for reapportioning every ten years. It is in marked contrast to the analogue provision in the Constitution of 1864 (Section 6) which required the legislature to reapportion every ten years on the basis of an enumeration of population. The Virginia Constitution contains no provision guaranteeing equal protection of the law. The two due process clauses are plainly inapplicable.[8]

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[8] One clause, under the heading of "criminal prosecutions generally," provides that no man shall "be deprived of life or liberty, except by the law of the land * * *." Art. I, Sec. 8. Apportionment of a legislature obviously has nothing to do with a criminal prosecution. The other provision states that "no person shall be deprived of his property without due process of law * * *." Art. I, Sec. 11. Since the right to fair representation involves liberty not property, this provision is likewise inapplicable.

Even if Virginia did have equal protection or a due process clause applying to liberty, we still believe abstention would not be proper. Many States have such provisions without applying them to require fair apportionment. Indeed, we know of no cases where they have been applied. Consequently, we do not believe that even when such clauses exist, there is a substantial enough likelihood that the State issue will be controlling for a federal court to stay its determination of the federal constitutional issues (this is on the assumption, which we reject above, pp. 16–18, that abstention is proper where there is a real question as to the validity of the State statutes under the State constitution):

Brown v. *Saunders*, 159 Va. 28, 166 S.E. 105, holds nothing to the contrary. The Supreme Court of Virginia held that the State's congressional districting violated Art. IV, Sec. 55, of the Virginia Constitution, which requires congressional districts to have "as nearly as practicable, an equal number of inhabitants." The specific requirement applicable to congressional districting obviously has no bearing on apportionment of the legislature.

Contrary to appellants' argument (Br. 26–28), the pendency of litigation in the State courts challenging the existing apportionment under both federal and State constitutions is irrelevant. The present case was brought on April 9, 1962 (R. 2), and decided by the district court on November 28, 1962 (R. 57, 79). *Tyler* v. *Davis* was not instituted in the State court until March 26, 1963, almost four months after the district court had rendered its decision; in the trial court the action was dismissed on the merits. Obviously, the district court could not have taken into account the State litigation even if it were relevant. Nor should pendency of this action, which throws no light upon the present issues, affect this Court's consideration of the federal controversy.[9]

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[9] There is equally no basis for abstention in the other apportionment cases now being heard on the merits by this Court—even if this issue had been raised in those cases. *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, was decided by a State court and therefore cannot possibly present the issue of abstention. In *WMCA, Inc.* v. *Simon*, No. 20, this Term, the New York apportionment faithfully follows the State constitution; indeed, it is the state constitutional provisions which are under attack. While the pre-

3. Although appellant does not raise the point, it may be suggested that since a court-ordered reapportionment (if the legislature refused to act following invalidation of the existing apportionment) would penetrate deeply into the political processes of the State and might require familiarity with State customs as well as State law, a federal court should not rule upon a challenge to an existing apportionment under the Fourteenth Amendment if the question could be litigated in a State court, which, presumably, would be better equipped to formulate a judical remedy. In our view, abstention for this purpose would not be appropriate for three reasons:

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existing apportionment in *Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term, violated the Alabama Constitution, the highest State court has refused to exercise jurisdiction in cases challenging the apportionment of the State legislature. *Waid* v. *Pool*, 255 Ala. 441, 442; 51 So. 2d 869; *Ex parte Rice*, 143 So. 2d 848 (Ala. Sup. Ct.);

As to the congressional districting in Georgia involved in *Wesberry* v. *Sanders*, No. 22, this Term, the Georgia Constitution has no provisions giving standards for congressional districts. While it has equal protection and due process clauses (Art. I, c. 2-1, Secs. 102, 103), there is no indication that these general provisions would invalidate the present districts making the decision of the federal constitutional issue unnecessary (see p. 22, note above). In any event, as we emphasize in our brief in that case (pp. 42–44), that case involves at the present time only whether the complaint should be dismissed for want of jurisdiction or of equity. Since, as we have seen above (pp. 15–16), there is plainly no basis for dismissal in order to allow the State courts to decide the State issues, the question of abstention is not now at issue. On remand, the district court may properly decide whether to stay proceedings for any valid reason, such as to allow the State legislature to act. See the cases cited in our brief in *Wesberry* v. *Sanders*, pp. 37–38.

First, the abstention doctrine has never been applied on the question of remedies. The doctrine is derived from the precepts of constitutional law preventing unnecessary constitutional decisions and advisory opinions. Neither line of reasoning would support abstention to allow a State court to frame a remedy for violation of a federal constitutional right.

Second, abstention prior to an adjudication of the merits would be inappropriate even if it might be within the court's discretion once the task of formulating a remedy was reached. The court below did not undertake to reapportion the Virginia legislature. It merely enjoined further action pursuant to the State statute and provided ample opportunity for the State legislature to adopt a new apportionment honoring plaintiffs' constitutional rights. In the event that the legislature fails to act—an event there is no apparent reason to anticipate—it will be time enough to consider what further relief should be awarded and whether the plaintiffs should be required to ascertain whether it can be obtained promptly in a State court.

Third, in the present case even a judicial reapportionment would not involve consideration of State law. The Virginia Constitution contains no standards for the apportionment of the legislature except to establish the maximum and minimum size of each house. There are no judicial decisions or statutes bearing upon the question beyond those which the district court found to be unconstitutional. Thus, in this case, even the formulation of a judicial reapportionment would not be entangled with questions of State law.

B. EVEN WHEN ABSTENTION IS APPROPRIATE, A DISTRICT COURT SHOULD RETAIN JURISDICTION TO ADJUDICATE THE CLAIMS OF FEDERAL CONSTITUTIONAL RIGHT

The doctrine of abstention, where applicable, provides for the determination of State and federal questions in orderly sequence. It is not a defense defeating the plaintiff's constitutional rights. Consequently, when a federal court stays its hand to await a State determination, the proper course is to retain jurisdiction pending the proceeding in the State courts. Thus, in *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 30–31, the Court, while holding that State issues should be decided by the State courts, ordered the federal district court to retain jurisdiction. *Accord, e.g., Harrison* v. *National Association for the Advancement of Colored People*, 360 U.S. 167, 179; *Government and Civic Employees Organizing Committee* v. *Windsor*, 353 U.S. 364, 366–367; *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 501–502; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 173; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 106; *American Federation of Labor* v. *Watson*, 327 U.S. 582, 599; *Albertson* v. *Millard*, 345 U.S. 242, 245. The Court in the *Louisiana Power* case specifically stated that "the mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of state court action" *Id.* at 27.

The occasional cases cited by appellants in which the Court has ordered the dismissal of actions brought in federal courts because of the existence of controlling State issues are readily distinguishable. In

Pennsylvania v. *Williams*, 294 U.S. 176, 184, the Court emphasized, in a case involving liquidation of a building and loan association, that it was not a State court but a State officer that was asserting jurisdiction, and that this officer was charged by State law with supervising and, in case of insolvents, liquidating the State's own associations. Furthermore, the case did not involve constitutional issues and the Court emphasized that purely private rights were involved. *Id.* at 185. *Hawks* v. *Hamill*, 288 U.S. 52, was a diversity case involving no claim of federal right and which depended entirely on the purely local question whether a State-granted franchise was valid under the State constitution. The Court in *Matthews* v. *Rodgers*, 284 U.S. 521, relied on the well-established rule that the federal courts will not enjoin State taxes where there is an adequate State remedy by suing for return of taxes paid. This is, as the Court emphasized (*id.* at 525), a particular application of the general equitable principle that suits in equity do not lie when there is an adequate legal remedy. In *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 383, this Court made clear that the Hawaii statute was susceptible to varying interpretations by the Hawaii courts. While the Court ordered, without discussion, the complaint to be dismissed rather than having the district court retain jurisdiction until the scope of the statute was reviewed, the result is inconsistent with the cases cited in the text above (pp. 15–16) and numerous other decisions of this Court. The Court in *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 331, 333–334, dismissed an action

challenging Texas' regulation of oil wells within the State since such regulation involves almost exclusively State issues which are of local and not general concern, and review by the federal courts will produce conflicting determinations where uniform regulation is necessary.

None of those cases is apposite here. There is no substantial remedy at law for the malapportionment of State legislatures. The State statutes here need no interpretation. Legislative apportionment is not of limited, local concern. Most important, the case raises basic, constitutional rights under the Fourteenth Amendment concerning the right of American citizens to equal participation in their own State government. Thus, even if the federal courts should sometimes stay proceedings in apportionment cases for the determination of State issues, dismissal is plainly improper. Once the State issues have been determined, it is the duty of the federal courts to protect constitutional rights and therefore to decide the constitutional issues. The responsibility continues whether or not State issues are also present.

The only case decided by this Court even suggesting that controversies involving State legislative apportionment should be dismissed for want of equity is *Colegrove* v. *Green*, 328 U.S. 549, which involved the analogous issue of Congressional districting. There, Mr. Justice Rutledge, who cast the deciding vote, said that the cases should be dismissed for want of equity. However, this view was not based on the need for determining whether the statute was ambiguous or might violate the State constitution. Rather, Mr.

Justice Rutledge concluded that the Court should refuse to exercise its equitable discretion because "[t]he shortness of the time remaining [before the next election] makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek." *Id.* at 565. In a subsequent case involving the Georgia county unit system, Mr. Justice Rutledge explained his position in *Colegrove* as based on the "particular circumstances" of that case. *Cook* v. *Fortson*, 329 U.S. 675, 678.

In the present case, there was no difficulty arising from the imminence of an election. Nor was there any other special reason why the district court should not have exercised its equitable discretion to prevent the violation of federal constitutional rights.

II

VIRGINIA'S LEGISLATIVE APPORTIONMENT VIOLATES THE FOURTEENTH AMENDMENT BY GROSSLY DISCRIMINATING AGAINST THE PEOPLE OF ARLINGTON AND FAIRFAX COUNTIES AND THE CITY OF NORFOLK WITHOUT RHYME OR REASON

In our brief in the Maryland case (pp. 24–34), we argued that population is the point of departure for judging the constitutionality under the Fourteenth Amendment of a State's legislative apportionment. Where serious inequalities are found in *per capita* representation, the apportionment violates the equal protection clause unless some rational basis can be found for the differentiation. When no justification is apparent and the State offers none that is adequate, the differ-

ences in the representation of voters in the several areas are arbitrary and capricious and therefore violate the Fourteenth Amendment.

These conclusions merely apply to apportionment principles long settled under the Fourteenth Amendment. As the Court said in *Baker* v. *Carr*, 369 U.S. 186, 226, "it has been open to the courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." The lower courts have consistently applied this principle in apportionment cases. See the authorities cited in our Maryland brief, pp. 39 and 50–51.

The Virginia apportionment is invalid under the foregoing rules.

A. THE VIRGINIA APPORTIONMENT SERIOUSLY DISCRIMINATES AGAINST THE VOTERS IN ARLINGTON AND FAIRFAX [10] COUNTIES AND IN THE CITY OF NORFOLK

The discrimination against the voters in Arlington, Fairfax and Norfolk is too plain for dispute.[11] Ar-

[10] We use Fairfax County as a short-hand description for the total area of the county including the cities of Fairfax and Falls Church which are actually independent. The county and the two cities constitute a single district in both the Senate and the House of Delegates.

[11] We do not mean to suggest that there is no discrimination against other districts, or that such discrimination does not violate the Fourteenth Amendment. Just as the district court did not consider it necessary to decide whether such discrimination was unconstitutional (see R. 67), we likewise do not discuss the issue. If the discrimination against Norfolk, Fairfax, and Arlington violates the Fourteenth Amendment, the apportionment is unconstitutional and the district court's injunction against further elections under it was proper.

lington, Fairfax and the City of Norfolk are the three most underrepresented districts in the State Senate. The extent of the discrimination is demonstrated both by the evidence that each has only about two-thirds of its proper representation and also by comparison of the *per capita* representation of their voters with that of the three most over-represented districts:

Senatorial district	Population (1960)	Senators	Population per Senator	Percent of ideal ratio[1]
Arlington	163,401	1	163,401	61
City of Norfolk	305,872	2	152,936	65
Fairfax, *et al*	285,194	2	142,597	70
Loudoun, *et al*	63,703	1	63,703	156
Goochland, *et al*	62,523	1	62,523	159
Brunswick, *et al*	61,730	1	61,730	161

[1] Since Virginia's population is 3,966,949, the average or ideal population per Senator is 99,174.

Thus, the three most overrepresented districts have 2½ times the per capita representation of Arlington and Norfolk and over twice the representation of Fairfax.

Arlington, Fairfax and Norfolk suffer in comparison with almost all other senate districts. They have the smallest percentages of the average ratio. Of the 36 senate districts, twelve have over twice the *per capita* representation of Arlington; ten have over twice the *per capita* representation of Norfolk; and six over twice that of Fairfax.

The situation in the House of Delegates is even worse. The average population per delegate for the State as a whole is 39,669. The population per delegate in Fairfax, Arlington, and the City of Norfolk, which are the first, fifth, and sixth most underrepre-

sented in the State,[12] are 95,064, 54,467, and 50,978, respectively. Contrast the three most overrepresented districts:

House district	Population (1960)	Delegates	Population per delegate	Percent of ideal ratio
Fairfax, et al.	285,194	3	95,064	42
Arlington	163,401	3	54,467	73
City of Norfolk	305,872	6	50,978	78
Grayson, et al.	22,644	1	22,644	175
Wythe	21,975	1	21,975	181
Shenandoah	21,825	1	21,825	182

Thus, the three most overrepresented districts have over four times the representation of Fairfax and about 2½ times the representation of Arlington and the City of Norfolk. Again, the discrimination is not confined to a few favored districts but runs against the counties in question in comparison with the rest of the State. Twenty-seven districts of the seventy have three times the representation of Fairfax; fifty-five districts have over twice the representation of Fairfax; twelve have twice the representation of Arlington; and six twice that of Norfolk City.[13]

Thus, the discrimination against Fairfax, Arlington, and Norfolk extends to both houses. Fairfax has only 70 percent of its appropriate representation in the Senate and only 42 percent in the House. Arling-

[12] The second, third, and fourth most underrepresented districts are the City of Hampton, Chesterfield, *et al.*, and the City of Portsmouth, which have populations of 89,258, 80,784 and 114,773 (57,386 per delegate), respectively.

[13] The table also shows severe discrimination even among Fairfax, Arlington, and Norfolk City. Fairfax has only 20,000 less people than Norfolk but Norfolk has twice as many delegates. Arlington has slightly over half the population of Fairfax, yet has the same number of delegates.

ton has 61 percent of its appropriate representation in the Senate and 73 percent in the House. Taking the legislature as a whole they are, by a wide margin, the three most underrepresented counties in the State.

Manifestly, the discrimination cannot be brushed aside as sport in an essentially fair plan of representation. The three districts in question contain almost one-fifth of the population of the State.[14]

B. THE GROSS DISCRIMINATION IS BASED UPON NO INTELLIGIBLE POLICY

The statutes of Virginia set forth no rational basis for the foregoing inequalities in *per capita* representation. None is advanced in any of the documents or other history underlying the statutory apportionment. Nor is any apparent from Virginia's history

[14] Appellants argue (Br. 46–50) that the discrepancies in Virginia between districts are not as great as those in the electoral college. However, as we showed in our brief in the Maryland case (pp. 73–80), the federal government was a compromise between a unified national government and a confederation. Those who favored the former type of government wanted representation based directly on population; supporters of the confederation wanted representation based on the States. Just as the Congress is a compromise of the two views as to the basic nature of the new government (and not as to what kind of apportionment is permissible); so is the electoral college. For a State has the same numbers of electoral votes as it has representatives which are determined by population, and senators, which are given equally to each State. The States, on the other hand, are unitary governments operating directly for the people and therefore only representation and statewide elections based on population are permissible.

In *Gray* v. *Sanders*, 372 U.S. 368, 378, this Court held that the electoral college was not analogous to the Georgia county unit system for statewide election; certainly, that analogy is far closer than the electoral college, which relates to nationwide elections, is to state legislative apportionment.

generally, except that the same areas suffered similar discrimination under the previous apportionment. The justifications now put forward by appellants are all afterthoughts that cannot be squared with the facts.

1. Appellants' principal contention (Br. 33–37) is that the inequalities in *per capita* representation are to be explained by a State policy of excluding from persons entitled to representation all transient military personnel and their families. The contention fails for two reasons.

First, the policy of Virginia, so far as evidenced by her election laws, actually favors military personnel. They are not included in the categories of persons disabled to vote. 24 Va. Code 18, Appendix A, p. 57. Military personnel and members of their families who have been residents of Virginia for a year, residents of a county, city or town for six months and residents of a precinct for 30 days are entitled to vote. 24 Va. Code 17, Appendix A, pp. 56–57. Although the mere stationing of military personnel in the State does not give them residence (24 Va. Code 19, Appendix A, p. 58), Virginia election officials interpret the provision to mean that residence for military personnel is determined in the same manner as for all other citizens. The Virginia election laws enable persons in the armed forces to vote without registration or payment of poll tax. 24 Va. Code (1962 Supp.) 23.1, Appendix A, pp. 57–58. While the literal language of the statute grants the privilege to those on "active service * * * in time of war," the Virginia State Board of Electors is applying it currently.

In no event could it be lightly assumed that in apportioning representatives the Virginia legislature would discriminate against men and women in their country's armed forces. Virginia's policy, as evidenced by its statutes, looks the other way. Since other non-voters, such as felons and other temporary residents, were not eliminated, it is unreasonable to suppose that a State which favors military personnel in voting, actually reversed itself to eliminate them from consideration in apportioning representatives in the legislature.

Appellants cite no evidence of any such legislative intent. All the proposed apportionment plans which preceded the 1962 apportionment, including the program of the Commission on Redistricting which reported to the governor (R. 159–188), invariably used total population without reference to military personnel or their families.

Second, the exclusion of military personnel from the total population of the various districts will not explain the discrimination against Fairfax, Arlington, and Norfolk. Nor will the exclusion of 2½ times the number of military personnel, as appellants suggest (Br. 37), in order to account for the entire families of servicemen, explain the discrimination.

The following table will show that there is the same gross discrimination in *per capita* representation in the Senate even if military personnel and their families are excluded from the population.[15]

[15] The number of military personnel in each county and independent city is given in Appendix B below, pp. 59–61. The population of each senatorial and house district after exclusion of military personnel and after exclusion of 2½ times the number of military personnel is also given in Appendix B. pp. 62–67.

Senatorial district	Population excluding military personnel (1960)	Population minus 2½ times military personnel (1960)	Senators	Population, excluding military personnel, per Senator	Population, minus 2½ times military personnel, per Senator	Percent of ideal ratio based on exclusion of military personnel	Percent of ideal ratio based on exclusion of 2½ times military personnel
Arlington	152,025	134,961	1	152,925	134,961	63	67
City of Norfolk	261,491	194,919	2	130,745	97,460	73	[1] 93
Fairfax, *et al.*	288,227	242,777	2	134,113	121,388	71	75
Loudoun, *et al.*	63,143	62,303	1	63,143	62,303	152	146
Goochland, *et al.*	62,325	62,028	1	62,325	62,028	154	146
Brunswick, *et al.*	61,730	61,730	1	61,730	61,730	155	147
State total	3,833,867	3,634,244	40	95,847	90,856	100	100

[1] Appellants state (Br. 57) that Norfolk City is over-represented in the Senate if military personnel and their families are excluded. This is incorrect. Appellants' view is based on an average population per Senator throughout the State of 99,174. However, if military personnel are excluded, the average population per Senator is 95,847 and if 2½ times the number of military is excluded the average population per Senator is 90,856.

Using total civilian population, the three most overrepresented counties have 2½ times the representation of Arlington and over twice the representation of the City of Norfolk and Fairfax. Of the 36 senate districts, ten have over twice the representation of Arlington, and three over twice the representation of Norfolk and of Fairfax. Using total population, minus 2½ times the number of military personnel, the three most overrepresented counties still have approximately twice the representation of Arlington and Fairfax. Twenty-two districts have over 1½ times the representation of Arlington, thirteen have over 1½ times the representation of Fairfax, and four have over 1½ that of Norfolk City.[16] The short of the matter is that the only significant change is in the figures for Norfolk County.

The factual inadequacy of appellants' theory is also apparent from the figures for the House of Delegates:

[16] The figures in this section are based upon the tables in Appendix B, pp. 62–64.

House district	Population excluding military personnel (1960)	Population minus 2¼ times military personnel (1960)	Delegates	Population, excluding military personnel, per delegate	Population, minus 2¼ times military personnel, per delegate	Percent of ideal ratio based on exclusion of military personnel	Percent of ideal ratio based on exclusion of 2¼ times military personnel
Fairfax, *et al.*	268, 277	242, 902	3	89, 425	80, 967	43	45
Arlington	152, 025	134, 961	3	50, 675	44, 987	76	81
City of Norfolk	261, 491	194, 930	6	43, 582	32, 487	88	112
Grayson, *et al.*	22, 640	22, 634	1	22, 640	22, 634	169	161
Wythe	21, 971	21, 965	1	21, 971	21, 965	175	166
Shenandoah	21, 817	21, 805	1	21, 817	21, 805	176	167
State total	3, 833, 867	3, 634, 244	100	38, 339	36, 342	100	100

Using total civilian population, the two most overrepresented districts have over four times the representation of Fairfax, 17 of the 70 districts have over three times the representation, and 40 have over twice the representation. Seven districts have twice the representation of Arlington and 26 over 1½ times the representation. Fourteen districts have over 1½ times the representation of Norfolk. Using total population, minus 2½ times the number of military personnel, the three most overrepresented counties have over 3½ times the representation of Fairfax[17] and about twice the representation of Arlington. Forty-eight house districts have over twice the representation of Fairfax, and 21 districts have over 1½ times the representation of Arlington (see App. B, pp. 65–67).

In short, even accepting appellants' figures of military connected personnel, they are wholly inadequate to explain the discrimination against the people of Arlington and Fairfax counties. The compelling inference is that comparisons of total population, less military personnel and their families, were not the basis of the apportionment. Thus, the discrimination against all three districts remains unexplained.[18]

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[17] Appellants state (Br. 38) that the ratio of representation in the House of Delegates of the most overrepresented county to Fairfax is 3.53 to 1 after 2½ times the military personnel are excluded from total population. In fact, the ratio is 3.71 to 1.

[18] Even if the exclusion of military personnel and their families from the total population of Virginia did explain the Virginia apportionment we submit the apportionment would still be unconstitutional. However, this would not be because the apportionment discriminated without rhyme or reason (see

2. Appellants also suggest (Br. 50, 56) that Virginia's apportionment is an attempt to balance urban and rural power in the legislature. The explanation, whatever its legal merit,[19] does not conform to the

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our brief in the Maryland case, pp. 34–39), but because the discrimination was invidious (see our brief in the Maryland case, pp. 39–46). We perceive no valid basis on which military personnel and their families may be deprived of representation in a State legislature. A State may limit the right to vote of persons not remaining long in the State through residence requirements and may base its apportionment on eligible voters. However, when military personnel and their families can vote by satisfying the general residence requirements (we doubt whether more restrictive voting requirements may validly be placed on servicemen), it is invidious discrimination to deprive them of representation by not including them when the apportionment is made. This is particularly so when all other categories of voters and even all non-voters are included within the population base used to make the apportionment.

Excluding military personnel and their families in voting on apportionment also discriminates against the overwhelming majority of other persons in counties and cities like Fairfax, Arlington, and Norfolk City with large numbers of military personnel. For the votes of these other people are diluted by the votes of the servicemen and their families, while not giving the area the appropriate amount of representation. As a result, voters in such areas have less voting strength in terms of either voters per legislator or total population per legislator than other areas of the State. We see no rational reason for so diluting the votes of these other persons.

[19] If the Virginia apportionment could be explained on the basis of an attempt to balance urban and rural power, we would argue that the resulting discrimination against urban areas was invidious. For, just as in *WMCA, Inc.* v. *Simon*, No. 20, this Term (see our brief, pp. 14–33), it was invidious discrimination to give significantly greater representation to less populous political subdivisions, it is likewise invidious to give greater representation to rural, in contrast to urban, areas. And this justification is not made reasonable because urban and rural

facts. Arlington and Fairfax are suburban areas while the City of Norfolk is an urban area. The City of Richmond, another urban area, has two senators for 219,958 people, or one per 109,979, which is 90 percent of its appropriate representation. This is 50 percent more representation than Arlington. In the House of Delegates, Richmond, which together with the suburban County of Henrico composes one district of 337,297 people with eight delegates, has an average of 42,162 people per delegate.[20] This is 94 percent of its ideal representation and well over twice the representation of Fairfax. Norfolk County and the City of South Norfolk, which are suburban areas adjoining the City of Norfolk, have 135 percent of their proper representation in the Senate—which is over twice the representation of Arlington, or of the City of Norfolk, and almost twice the representation of Fairfax. As to the House of Delegates, Norfolk County and South Norfolk have 108 percent of their proper representation which is over twice the representation of Fairfax

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power is allegedly balanced. An equally strong argument could be made for balancing Protestant and Catholic representation, Negro and white, business and labor. The very point of democratic government is not to give a group greater representation than its numbers justify.

This is not to say, however, that a State cannot give minimum representation to each political subdivision. We have assumed *arguendo* in these cases that such a method of apportionment is proper since the discrimination against urban voters is only an incidental result. However, we have limited this assumption to apportionments which do not result in gross discrimination. See our brief in the Maryland case, pp. 24–25, 46–50.

[20] Henrico has, in addition, a representative to itself.

and almost 1½ times the representation of Arlington and the City of Norfolk.[21]

Moreover, the balance which appellants claim results in the legislature between urban and rural areas is based on the inclusion in the urban category of many small cities not considered by the United States Census as metropolitan areas. Department of Commerce, *County and City Data Book, 1962*, p. 665. Many of these small cities are overrepresented in the Virginia legislature. For example, the City of Lynchburg and Campbell County have 113 percent of their proper Senate representation, Augusta, *et al.*, have 118 percent, and Dinwiddie, *et al.*, have 134 percent. Similarly, in the House of Delegates, Charlottesville has 135 percent of its proper representation, Allegany, *et al.*, have 139 percent, Nelson and the City of Petersburg and Dinwiddie County have 135 percent.

3. Appellants contend (Br. 56–58) that the apportionment can be explained by the factors of area and the number of political subdivisions in each district.[22]

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[21] Appellants suggest (Br. 56, 58) that population density may explain the Virginia apportionment. This is virtually, however, the same thing as giving more representation to rural than urban areas as population density is much lower in the former than the latter. Moreover, while there are no figures on this issue in the record, it seems unlikely that the City of Richmond is less densely populated than most suburban areas as Arlington or especially Fairfax. Indeed, we doubt that there is any appreciable difference in density between urban areas such as Richmond and Norfolk City and among suburban areas like Arlington, Fairfax, Henrico, Norfolk County, and South Norfolk.

[22] We do not understand how the number of political subdivisions has any relevance and therefore inequalities result-

These factors are likewise inadequate. The senatorial district of Norfolk County and South Norfolk has one governmental unit and an area of 344 square miles (R. 275). The Fairfax senatorial district, on the other hand, has three governmental units and 407 square miles (R. 279). Yet, as we have seen (pp. 41–42), the former district has almost twice the representation of the latter. The City of Richmond has 37 square miles and only one governmental subdivision (R. 280). Yet, it has almost 50 percent more representation in the Senate than Norfolk, which has 50 square miles and one governmental subdivision (R. 275). The senatorial district of Dinwiddie *et al.*, has 823 square miles and 3 political subdivisions (R. 276). The senatorial district of Accomack, *et al.*, has 951 square miles and 3 political subdivisions (R. 275). Yet, the former district has 134 percent of its proper representation and the latter has 75 percent. The senatorial district of King George, *et al.*, has 1564 square miles and 7 governmental subdivisions (R. 279); Brunswick, *et al.*, has 1648 square miles and 3 political subdivisions (R. 276); the City of Hampton has 57 square miles and 1 political subdivision (R. 280);

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ing resulting from this factor would constitute invidious discrimination. An apportionment based in whole or part on area would also be invidious since legislators represent people, not land. The only possible relevance of basing an apportionment on area would be to assure that every area of the State had a spokesman for its views in the legislature. Even assuming this would justify some inequality, this objective would be satisfied by giving each area a representative in one house of the legislature; it could not justify Virginia's discrimination in both houses.

and Alexandria has 15 square miles and one political subdivision (R. 280). Yet, King George, *et al.*, has 89 percent of its appropriate representation and Brunswick has 161 percent, Hampton has 111 percent, and Alexandria 109 percent.

In the House of Delegates, Norfolk County and the City of South Norfolk, having 344 square miles and 1 governmental unit, has 107 percent of its proper representation (R. 289). Fairfax, having 407 square miles and 3 governmental subdivisions (R. 286), has 42 percent of its proper representation. Thus, the former district, with substantially less area and ⅓ the number of governmental subdivisions, has 2½ times as much representation. Charlottesville has 6 square miles and 1 governmental subdivision (R. 283). Yet, it has 135 percent of its proper representation. Thus, Charlottesville, with 1/68 the area and ⅓ the governmental units, has 3 times the representation of Fairfax. Wythe and Shenandoah, the two most overrepresented House districts in the State, have 460 and 507 square miles respectively, and each is a governmental subdivision (R. 290, 291). Yet, they have 181 and 182 percent of their proper representation. In contrast, Russell, *et al.*, has 818 square miles and 2 governmental subdivisions (R. 284), but only 85 percent of its appropriate representation. Charles City County, *et al*, has 670 square miles, 5 governmental subdivisions (R. 285), and only 79 percent of its proper representation. And Washington, *et al.*, which is the fifth largest in the State in area, having 1,122 square miles and 3 governmental sub-

divisions (R. 291), has only 98 percent of its proper representation.[23]

4. Nor do we know of any other explanation, not suggested by appellants, for the serious discrimination against Arlington, Fairfax, and Norfolk City. First, the discrimination cannot be explained as giving less representation to populous political subdivisions to prevent their control of the State legislature. While the Counties of Arlington and Fairfax and the City of Norfolk are three of the four most populous political subdivisions in the State, the third most populous is the City of Richmond.[24] As we have seen, however, Richmond is only slightly underrepresented. Moreover, the fourth most populous political subdivision, Arlington, is the most underrepresented in the Senate. And the most populous subdivision, the City of Norfolk, is only the second most underrepresented in the Senate and sixth most underrepresented in the House. The second, third, and

[23] The Virginia apportionment cannot be justified by appellants' suggestion (Br. 58–59) that it is an attempt to ensure adequate accessibility of representatives and voters in rural areas by keeping rural districts limited in size. This is merely the factor of area in a different guise. We have seen (pp. 42–44) that districts having a smaller area frequently have greater representation measured by population than larger. The opposite would obviously be true if accessibility of legislators to the voters were an important factor.

[24] We are not suggesting that discrimination against populous subdivisions would be a constitutionally valid justification for disparities in representation. In our brief in *WMCA, Inc.* v. *Simon*, No. 20, this Term, pp. 14–33, we argue that a classification giving less representation to populous political subdivisions is invidious under the third principle we suggested in the Maryland case (see our brief in that case, pp. 39–46) and therefore violates the Fourteenth Amendment.

fourth most underrepresented districts in the House have, in contrast to the 305,872 people in Norfolk, only 89,288, 80,784 and 114,773 (57,386 per delegate) people, respectively. And even if Arlington, Fairfax, and the Cities of Norfolk and Richmond were given their full proportionate representation, they have less than one-fourth the population of the State.

Finally, the apportionment of Virginia cannot be justified on the ground that it is an attempt to balance the power of different areas of the State in the legislature. Arlington and Fairfax, which are seriously underrepresented, are in the north of the State. Loudoun, in contrast, which adjoins Fairfax County has 162 percent of the appropriate representation in the House of Delegates, over twice the representation of Arlington and almost four times that of Fairfax. In the Senate, Loudoun has over 2½ times the representation of Arlington and twice that of Fairfax. Similarly, as we noted above, Norfolk County and the City of South Norfolk, which adjoin the City of Norfolk in the southeastern part of the State, have over twice the representation of Norfolk City in the Senate and 1½ times in the House. Similarly, the House district in the southeast composed of the Counties of Nansemond and the Isle of Wight and the City of Suffolk have 65 percent of the appropriate representation and they are in a Senate district with 112 percent of its appropriate representation.

Appellants contend (Br. 45–46) that the Virginia apportionment is not unconstitutional because Virginia ranks eighth among the States in the representativeness of its legislature (see R. 266). However, this figure is based on the percentage of people electing a majority of the two houses of the legislature. Under the 1962 statute, 41.1 percent of the population elects a majority of the Senate and 40.5 percent elects a majority of the House. These figures are relevant to the fourth principle advanced by the government in its brief in the Maryland case (pp. 46–50)—whether an apportionment so grossly discriminates as to give control of the legislature to a substantial minority of the people. But this question, in the government's view, need not be reached in this case. We believe that a State may not apportion its legislature so as to discriminate significantly against a substantial number of voters when it can suggest no rational basis for the discrimination, even though a large minority is needed to elect a majority of the legislature.

This Court has repeatedly held that legislative classifications may not be arbitrary and capricious. "The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Goesaert* v. *Cleary*, 335 U.S. 464, 466. See, *e.g.*, *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79. Virginia, by giving some

counties and cities two or more times the representation of other counties or cities, has obviously made a classification to the detriment of the underrepresented areas. Such a classification must rest at the very least, upon some intelligible foundation or else be condemned as a denial of equal protection. The several explanations advanced by appellants are manifest afterthoughts and do not conform to the facts. No other justification is reasonably apparent. Under these circumstances there was no occasion for the district court to look farther before ruling that the apportionment violates the Fourteenth Amendment. "Discriminations are not to be supported by mere fanciful conjecture." *Hartford Co.* v. *Harrison*, 301 U.S. 459, 462; *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 209.[25]

[25] Appellants raise no issue as to the remedy ordered by the district court—*i.e.*, an injunction against further elections under the present apportionment statutes. The traditional remedy when a State statute is held unconstitutional is to enjoin further actions based on it. The State and lower federal courts have in numerous cases used this remedy in the field of apportionment. *E.g.*, *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala.), pending on appeal *sub. nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Thigpen* v. *Meyers*, U.S. D.C., W.D. Wash., decided May 3, 1963; *Scholle* v. *Secretary of State*, 367 Mich. 176, 116 N.W. 2d 350; *Parker* v. *State*, 133 Ind. 178, 32 N.E. 836; *Denny* v. *State*, 144 Ind. 503, 42 N.E. 929; *Brooks* v. *State*, 162 Ind. 568, 70 N.E. 980; *Ragland* v. *Anderson*, 125 Ky. 141, 100 S.W. 865; *Armstrong* v. *Mitten*, 95 Colo. 425, 37 P. 2d 757; *Stiglitz* v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315; *Rogers* v. *Morgan*, 127 Neb. 456, 256 N.W. 1; *State ex rel. Lamb* v. *Cunningham*, 83 Wis. 90, 53 N.W. 35; *State ex rel. Attorney General* v. *Cunningham*, 81 Wis. 440, 51 N.W. 724; *Asbury Park Press, Inc.* v. *Wooley*, 33 N.J. 1, 161 A. 2d 705, 713–714.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the district court should be affirmed.

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OCTOBER 1963.

APPENDIX A

Sections 40 to 43 of Article IV of the Virginia Constitution provide as follows:

> *Section 40.* The legislative power of the State shall be vested in a general assembly which shall consist of a senate and house of delegates.
>
> *Section 41.* The senate shall consist of not more than forty and not less than thirty-three members, who shall be elected quadrennially by the voters of the several senatorial districts on the Tuesday succeeding the first Monday in November.
>
> *Section 42.* The house of delegates shall consist of not more than one hundred and not less than ninety members, who shall be elected biennially by the voters of the several house districts, on the Tuesday succeeding the first Monday in November.
>
> *Section 43.* The present apportionment of the Commonwealth into senatorial and house districts shall continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter.

Chapter 635 of the Virginia Acts of Assembly for 1962, approved April 7, 1962, provides as follows:

> *Be it enacted by the General Assembly of Virginia:*
>
> That § 24–14, as amended, of the Code of Virginia, be amended and reenacted as follows:
>
> § 24–14. The State is hereby divided into thirty-six districts entitled to senators as follows:
>
> First.—*The counties of* Accomack, Northampton, Princess Anne and *the city of* Virginia Beach, one.

Second.—Norfolk city, two.

Third.—Norfolk county and *the city of* South Norfolk, one.

Fourth.—*The counties of* Halifax, Charlotte and Prince Edward *and the city of South Boston*, one.

Fifth.—*The counties of* Isle of Wight, Nansemond, Southampton and *the cities of* Suffolk *and Franklin*, one.

Sixth.—*The counties of* Greensville, Prince George Surry and Sussex *and the city of Hopewell*, one.

Seventh.—*The counties of* Brunswick, Lunenburg and Mecklenburg, one.

Eighth.—*The counties of* Dinwiddie, Nottoway and *the city of* Petersburg, one.

Ninth.—Arlington *county*, one.

Tenth.—*City of* Portsmouth, one.

Eleventh.—*The counties of* Appomattox, Buckingham, Cumberland, Powhatan, Amherst, Nelson and Amelia, one.

Twelfth.—Campbell *county* and *city* of Lynchburg, one.

Thirteenth.—*The counties of* Henry, Patrick and Pittsylvania *and the cities of* Danville and Martinsville, two.

Fourteenth.—*The counties of Smyth*, Carroll, Floyd, Grayson and *the city of* Galax, one.

Fifteenth.—*The counties of* Washington, Lee and Scott *and the city of* Bristol, one.

Sixteenth.—*The counties of* Dickenson *and* Wise and *the city of* Norton, one.

Seventeenth.—*The counties of* Buchanan, Russell and Tazewell, one.

Eighteenth.—*The counties of* Bland, Giles, Pulaski and Wythe, one.

Nineteenth.—*The counties of* Alleghany, Bedford, Botetourt, Craig and Rockbridge, *and the cities of* Buena Vista, Clifton Forge, *and* Covington, one.

Twentieth.—*The counties of* Franklin, Montgomery, and Roanoke, *and the city of* Radford, one.

Twenty-first.—*The counties of* Augusta, Bath, *and* Highland, *and the cities of* Staunton and Waynesboro, one.

Twenty-second.—*The counties of* Page, Rappahannock, Rockingham and Warren, *and the city of* Harrisonburg, one.

Twenty-third.—*The counties of* Clarke, Frederick, Shenandoah *and the city of* Winchester, one.

Twenty-fourth.—*The counties of* Albemarle, Fluvanna, Greene and Madison, *and the city of* Charlottesville, one.

Twenty-fifth.—*The counties of* Goochland, Louisa, Orange and Spotsylvania, *and the city of* Fredericksburg, one.

Twenty-six.—*The counties of* Culpeper, Fauquier and Loudoun, one.

Twenty-seventh.—*The county of* Fairfax and *the cities of Fairfax* and Falls Church, *two.*

Twenty-eighth.—*The counties of* King George, Lancaster, Northumberland, Prince William, Richmond, Stafford and Westmoreland, one.

Twenty-ninth.—*The counties of* Caroline, Hanover, King William, Essex, King and Queen, Middlesex, *Gloucester and Mathews*, one.

Thirtieth.—City of Newport News and *county of* York, one.

Thirty-first.—*City of* Hampton, one.

Thirty-second.—*The counties of* Charles City, Chesterfield, *James City and New Kent* and the cities of Colonial Heights and *Williamsburg*, one.

Thirty-third.—Richmond city, *two.*

Thirty-fourth.—*County of Henrico, one.*

Thirty-fifth.—*City of* Roanoke, one.

Thirty-sixth.—City of Alexandria, one.

Chapter 638 of the Virginia Acts of Assembly for 1962, approved April 7, 1962, provides as follows:

That § 24–12, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24–12. Members of the House of Delegates shall be distributed and apportioned, and each county, city and combination is entitled to representation in the House of Delegates by a delegate, or by delegates, as follows:

First.—Accomack, one.

Second.—Accomack and Northampton, one.

Third.—Albemarle and Greene, one.

Fourth.—Charlottesville, one.

Fifth.—Alexandria, *two.*

Sixth.—Alleghany, Covington and Clifton Forge, one.

Seventh.—Amelia, Powhatan and Nottoway, one.

Eighth.—Amherst and Lynchburg, one.

Ninth.—Arlington, three.

Tenth.—Augusta, Highland, Staunton and Waynesboro, two.

Eleventh.—Bedford, one.

Twelfth.—Bland and Giles, one.

Thirteenth.—Botetourt, Craig *and Roanoke County,* one.

Fourteenth.—Brunswick and Lunenburg, one.

Fifteenth.—Buchanan, one.

Sixteenth.—*Russell* and Dickenson, one.

Seventeenth.—Buckingham, Appomattox and Cumberland, one.

Eighteenth.—Campbell, one.

Nineteenth.—Caroline, King George, Essex and King and Queen, one.

Twentieth.—Carroll and Floyd, one.

Twenty-first.—Charles City, James City, New Kent, York and Williamsburg, one.

Twenty-second.—Charlotte and Prince Edward, one.

Twenty-third.—Chesterfield and Colonial Heights, one.

Twenty-fourth.—Clarke, Frederick and Winchester, one.

Twenty-fifth.—Danville, one.

Twenty-sixth.—Hampton, one.

Twenty-seventh.—Fairfax, *and cities of Fairfax* and Falls Church, *three.*

Twenty-eighth.—Fauquier and Rappahannock, one.

Twenty-ninth.—Fluvanna, Goochland and Louisa, one.

Thirtieth.—Franklin, one.

Thirty-first.—Gloucester, Mathews and Middlesex, one.

Thirty-second.—Grayson and Galax, one.

Thirty-third.—Greensville and Sussex, one.

Thirty-fourth.—Halifax *and South Boston,* one.

Thirty-fifth.—Hanover and King William, one.

Thirty-sixth.—Henrico, one.

Thirty-seventh.—Henry, Patrick and Martinsville, two.

Thirty-eighth.—Isle of Wight, Nansemond and Suffolk, one.

Thirty-ninth.—Northumberland, Westmoreland, Lancaster and Richmond county, one.

Fortieth.—Newport News, three.

Forty-first.—Lee, *Wise, and city of Norton, two.*

Forty-second.—Loudon, one.

Forty-third.—Lynchburg, one.

Forty-fourth.—Madison, Culpeper and Orange, one.

Forty-fifth.—Mecklenburg, one.

Forty-sixth.—Montgomery and Radford, one.

Forty-seventh.—Nansemond and Suffolk, one.

Forty-eighth.—Nelson and Amherst, one.

Forty-ninth.—Norfolk county and South Norfolk, two.

Fiftieth.—Norfolk city, six.

Fifty-first.—Page and Warren, one.

Fifty-second.—Petersburg and Dinwiddie, two.

Fifty-third.—Pittsylvania, two.

Fifty-fourth.—Portsmouth, two.

Fifty-fifth.—Prince George, Surry and Hopewell, one.

Fifty-sixth.—Princess Anne and Virginia Beach, *two.*

Fifty-seventh.—Prince William, one.

Fifty-eighth.—Pulaski, one.

Fifty-ninth.—Richmond city, *and Henrico, eight.*

Sixtieth.—Roanoke County, one.

Sixty-first.—Roanoke city, two.

Sixty-second.—Rockbridge, Bath and Buena Vista, one.

Sixty-third.—Rockingham and Harrisonburg, two.

Sixty-fourth.—Shenandoah, one.

Sixty-fifth.—Smyth, one.

Sixty-sixth.—Southampton *and the city of Franklin,* one.

Sixty-seventh.—Spotsylvania, *Stafford,* and Fredericksburg, one.

Sixty-eighth.—Tazewell, one.

Sixty-ninth.—Washington, *Scott* and Bristol, two.

Seventieth.—Wythe, one.

And the districts hereby created are hereby numbered one (1) to seventy (70) inclusive.

Section 17 of 24 Virginia Code (1950) provides:

> Every citizen of the United States twenty-one years of age, who has been a resident of the State one year, of the county, city or town, six months, and of the precinct in which he offers to vote thirty days next preceding the election, in which he offers to vote, has been duly registered, and has paid his State poll taxes, as required by law, and is otherwise qualified, under the Constitution and laws of

this State, shall be entitled to vote for members of the General Assembly and all officers elective by the people. Removal from one precinct to another in the same county, city or town, shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days from such removal.

Section 18 of 24 Virginia Code (1950) provides:

> The following persons shall be excluded from registering and voting: Idiots, insane persons and paupers; persons who, prior to the adoption of the Constitution, were disqualified from voting by conviction of crime, either within or without the State, and whose disabilities shall not have been removed; persons convicted after the adoption of the Constitution, either within or without this State, for treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery or perjury; persons who, while citizens of this State since the adoption of the Constitution, have fought a duel with a deadly weapon, or sent or accepted a challenge to fight such duel, either within or without this State, or knowingly conveyed a challenge, or aided or assisted in any way in the fighting of such duel.

Section 23.1 of 24 Virginia Code (1962 Supp.) provides:

> Whenever a majority of the judges of election of any precinct are satisfied, by such evidence as they may deem proper, that a person offering to vote in person in any election, is in active service as a member of the armed forces of the United States in time of war, and that such person is otherwise qualified to vote, they shall permit such person to vote in such election (and also in any second primary election that may be held in connection therewith)

without being required to register or to pay any poll tax; provided, however, that such person shall execute and file with the judges of election an affidavit, subscribed and sworn to before a judge of election, substantially as follows:

"I do swear (or affirm) that I am now and have been a citizen and domiciliary resident of Virginia since the __ day of _____, 19__, and am a resident of the _____ (city or county) of _____ (name of city or county) residing at _____ (street and number or place of residence therein) and am now in active service in the armed forces of the United States; that I am twenty-one years of age; and that by exercising the privilege of voting I acknowledge and accept all of the responsibilities and obligations of full citizenship of the Commonwealth of Virginia. The name or number of my voting precinct is _____ (if known, so state.)

_____

"Subscribed and sworn to before me this __ day of _____, 19__

_____

Judge of Election."

The affidavit shall be returned to the clerk's office with the ballots and shall be preserved by the clerk as a public record until such time as the judge of the circuit or corporation court of the county or city in whose clerk's office the affidavit is filed shall order the same to be destroyed.

Section 19 of Title 24 Virginia Code (1950) provides:

No officer, soldier, seaman or marine of the United States army or navy, shall be deemed to have gained a residence as to the right of suffrage in the State, or in any county, city or town thereof, by reason of his being stationed therein.

APPENDIX B

MILITARY POPULATIONS OF COUNTIES AND INDEPENDENT CITIES[1]

Political subdivision	Male	Female	Total
COUNTIES			
Accomack	79		79
Albemarle	91		91
Alleghany			
Amelia			
Amherst	5		5
Appomattox			
Arlington	10,628	748	11,376
Augusta	7		7
Bath			
Bedford	65		65
Bland			
Botetourt	80		80
Brunswick			
Buchanan	7		7
Buckingham			
Campbell	17		17
Caroline	93		93
Carroll			
Charles City			
Charlotte			
Chesterfield	214		214
Clarke	4		4
Craig			
Culpeper	4		4
Cumberland			
Dickenson			
Dinwiddie	49		49
Essex	11		11
Fairfax[2]	16,454	239	16,693
Fauquier	489	8	497
Floyd			
Fluvanna	7		7
Franklin	3		3
Frederick	30		30
Giles			

[1] This table is based on Table 83 of Book No. PC(1), 48C Va., *United States Census of Population 1960 Virginia: General Social and Economic Characteristics*, pp. 185-187, 224-234, which we are filing with the Clerk. The Census Bureau has informed us that the military population for females is determined by adding, in Table 83, the total of females employed and unemployed under the "Labor Force" subheading, and subtracting this sum from the total labor force.

The Court now has on file Book No. PC(1), 48D, Va., *United States Census of Population 1960 Virginia: Detailed Characteristics*, pp. 395-404. Table 115 of this book shows the total 1960 military population of Virginia and indicates the military population breakdown for standard metropolitan statistical areas and counties of 250,000 population or more.

[2] At the time of the census, the City of Fairfax was part of the County of Fairfax. Therefore, the County figures include the total of what is now the County and separate City of Fairfax.

MILITARY POPULATIONS OF COUNTIES AND INDEPENDENT CITIES—Continued

Political subdivision	Male	Female	Total
COUNTIES—continued			
Gloucester	16		16
Goochland	5		5
Grayson	4		4
Greene			
Greensville	4		4
Halifax	3		3
Hanover	9		9
Henrico	228		228
Henry			
Highland			
Isle of Wight	105		105
James City	217		217
King and Queen		4	4
King George	136	3	139
King William	4		4
Lancaster	7		7
Lee			
Loudon	89		89
Louisa	12		12
Lunenburg			
Madison			
Mathews	16		16
Mecklenburg			
Middlesex			
Montgomery	34	4	38
Nansemond	67		67
Nelson			
New Kent	3		3
Norfolk	201	8	209
Northampton	199		199
Northumberland			
Nottoway	110		110
Orange			
Page			
Patrick			
Pittsylvania	8		8
Powhatan			
Prince Edward	8		8
Prince George	5,270	78	5,228
Prince William	7,634	205	7,239
Princess Anne	9,525	19	9,544
Pulaski	13	4	17
Rappahannock			
Richmond			
Roanoke	41		41
Rockbridge	31		31
Rockingham			
Russell	8		8
Scott	4		4

MILITARY POPULATIONS OF COUNTIES AND INDEPENDENT CITIES—Continued

Political subdivision	Male	Female	Total
COUNTIES—continued			
Shenandoah	8		8
Smyth	23	4	27
Southampton			
Spotsylvania	22		22
Stafford	589		589
Surry	4		4
Sussex			
Tazewell	9	4	13
Warren	7		7
Washington	4		4
Westmoreland			
Wise	20		20
Wythe	4		4
York	1,648	8	1,656
INDEPENDENT CITIES			
Alexandria	3,693	48	3,741
Bristol	12	5	17
Buena Vista	7		7
Charlottesville	122		122
Clifton Forge			
Colonial Heights	243		243
Covington	12	3	15
Danville	8		8
Falls Church	274		274
Fredericksburg	159		159
Galax			
Hampton	6,376	102	6,470
Harrisonburg			
Hopewell	353		353
Lynchburg	31		31
Martinsville			
Newport News	8,532	163	8,695
Norfolk	43,946	435	44,381
Norton			
Petersburg	800	4	804
Portsmouth	10,354	168	10,522
Radford	3		3
Richmond	196	4	189
Roanoke	71	4	75
South Boston			
South Norfolk	219	3	222
Staunton	16		16
Suffolk	18		18
Virginia Beach	704		704
Waynesboro	4		4
Williamsburg	97		97
Winchester	4	4	8
Total	130,804	2,278	133,082

REPRESENTATION IN THE SENATE EXCLUDING MILITARY PERSONNEL AND THEIR FAMILIES

Senatorial District	Total civilian population (1960)	Total population, minus 2¼ times the number of military personnel (1960)	Number of senators	Civilian population per senator	Population, minus 2¼ times the number of military personnel, per senator
Accomack Northampton Princess Anne City of Virginia Beach	121,290	105,801	1	121,290	105,801
Norfolk City	261,491	194,290	2	130,745	97,650
Norfolk County City of South Norfolk	72,816	70,820	1	72,816	70,820
Halifax Charlotte Prince Edward City of South Boston	67,089	67,073	1	67,089	67,073
Isle of Wight Nansemond Southampton City of Suffolk City of Franklin	88,144	87,859	1	88,144	87,859
Greensville Prince George Surry Sussex	67,264	58,734	1	67,264	58,734
Hopewell Brunswick Lunenburg Mecklenburg	61,730	61,730	1	61,730	61,730
Dinwiddie Nottoway City of Petersburg	73,321	72,192	1	73,321	72,192
Arlington	163,025	134,961	1	163,025	134,961
City of Portsmouth	104,251	88,468	1	104,251	88,468
Appomattox Buckingham Cumberland Powhatan	76,644	76,632	1	76,644	76,632
Amherst Nelson Amelia					
Campbell City of Lynchburg	87,700	87,628	1	87,700	87,628
Henry Patrick Pittsylvania City of Danville	179,272	179,249	2	89,636	89,624
City of Martinsville Smyth Carroll Floyd Grayson City of Galax	87,319	87,273	1	87,319	87,273

REPRESENTATION IN THE SENATE EXCLUDING MILITARY PERSONNEL AND THEIR FAMILIES—Continued

Senatorial District	Total civilian population (1960)	Total population, minus 2¼ times the number of military personnel (1960)	Number of senators	Civilian population per senator	Population, minus 2¼ times the number of military personnel, per senator
Washington					
Lee	106,832	106,795	1	106,832	106,795
Scott					
City of Bristol					
Dickenson					
Wise	66,766	66,736	1	66,766	66,736
City of Norton					
Buchanan					
Russell	107,777	107,735	1	107,777	107,735
Tazewell					
Bland					
Giles	72,413	72,382	1	72,413	72,382
Pulaski					
Wythe					
Alleghany					
Bedford					
Botetourt					
Craig	109,606	109,401	1	109,606	109,401
Rockbridge					
City of Buena Vista					
City of Clifton Forge					
City of Covington					
Franklin					
Montgomery	129,827	129,700	1	129,827	129,700
Roanoke					
City of Radford					
Augusta					
Bath					
Highland	83,818	83,778	1	83,818	83,778
City of Staunton					
City of Waynesboro					
Page					
Rappahannock					
Rockingham	87,989	87,979	1	87,989	87,979
Warren					
City of Harrisonburg					
Clarke					
Frederick	66,766	66,693	1	66,766	66,693
Shenandoah					
City of Winchester					
Albemarle					
Fluvanna					
Greene	80,305	79,975	1	80,305	79,975
Madison					
City of Charlottesville					

REPRESENTATION IN THE SENATE EXCLUDING MILITARY PERSONNEL AND THEIR FAMILIES—Continued

Senatorial District	Total civilian population (1960)	Total population, minus 2¼ times the number of military personnel (1960)	Number of senators	Civilian population per senator	Population, minus 2¼ times the number of military personnel, per senator
Goochland Louisa Orange Spotsylvania City of Fredericksburg Culpeper	62,325	62,028	1	62,325	62,028
Fauquier Loudoun Fairfax	63,143	62,303	1	63,143	62,303
City of Fairfax City of Falls Church	268,227	242,777	2	134,113	121,388
King George Lancaster Northumberland Prince William Richmond Stafford Westmoreland	103,065	91,074	1	103,065	91,074
Caroline Hanover King William Essex King and Queen Middlesex Gloucester Mathews	85,623	85,304	1	85,623	85,304
Consolidated City of Newport News York	124,804	109,368	1	124,804	109,368
City of Hampton Charles City County Chesterfield James City County City of Colonial Heights City of Williamsburg New Kent	82,779 108,375	73,061 107,211	1 1	82,779 108,375	73,061 107,211
City of Richmond Henrico City of Roanoke City of Alexandria	219,750 117,111 97,035 87,282	219,461 116,769 96,923 81,671	2 1 1 1	109,879 117,111 97,035 87,282	109,730 116,769 96,923 81,671
Total	3,838,887	3,634,204	40	95,847	90,857

REPRESENTATION IN THE HOUSE OF DELEGATES EXCLUDING MILITARY PERSONNEL AND THEIR FAMILIES

House district	Total civilian population (1960)	Total population, minus 2½ times the number of military personnel (1960)	Number of delegates	Civilian population per delegate	Population, less 2½ times the number of military personnel, per delegate
Accomack	30,556	30,438	1	30,556	30,438
Accomack	47,323	46,906	1	47,323	46,906
Northampton					
Albemarle	35,593	35,457	1	35,593	35,457
Greene					
Charlottesville	29,305	29,122	1	29,305	29,122
Alexandria	87,282	81,671	2	43,641	40,835
Alleghany					
City of Covington	28,443	28,421	1	28,443	28,421
City of Clifton Forge					
Amelia					
Powhatan	29,503	29,428	1	29,503	29,428
Nottoway					
Amherst					
City of Lynchburg	77,704	77,646	1	77,704	77,646
Arlington	152,025	134,961	3	50,675	44,987
Augusta					
Highland					
City of Staunton	78,483	78,443	2	39,241	39,221
City of Waynesboro					
Bedford	30,963	30,866	1	30,963	30,866
Bland					
Giles	23,201	23,201	1	23,201	23,201
Botetourt					
Craig					
Roanoke County	81,643	81,462	1	81,643	81,462
Brunswick					
Lunenburg	30,302	30,302	1	30,302	30,302
Buchanan	36,717	36,707	1	36,717	36,707
Russell					
Dickenson	46,493	46,481	1	46,493	46,481
Buckingham					
Appomattox	26,385	26,385	1	26,385	26,385
Cumberland					
Campbell	32,941	32,916	1	32,941	32,916
Caroline					
King George					
Essex	32,280	31,880	1	32,280	31,880
King and Queen					
Carroll					
Floyd	33,640	33,640	1	33,640	33,640
Charles City County					
James City County					
New Kent	47,977	45,018	1	47,977	45,018
York					
City of Williamsburg					
Charlotte	27,481	27,469	1	27,481	27,469
Prince Edward					

REPRESENTATION IN THE HOUSE OF DELEGATES EXCLUDING MILITARY PERSONNEL AND THEIR FAMILIES—Continued

House district	Total civilian population (1960)	Total population, minus 2¼ times the number of military personnel (1960)	Number of delegates	Civilian population per delegate	Population, less 2¼ times the number of military personnel, per delegate
Chesterfield	80,325	79,637	1	80,325	79,637
City of Colonial Heights					
Clarke	44,951	44,888	1	44,951	44,888
Frederick					
City of Winchester					
City of Danville	46,569	46,557	1	46,569	46,557
City of Hampton	82,779	73,061	1	82,779	73,061
Fairfax County	268,227	242,777	3	89,409	80,926
City of Fairfax					
City of Falls Church					
Fauquier	28,937	28,192	1	28,937	28,192
Rappahannock					
Fluvanna	29,368	29,332	1	29,368	29,332
Goochland					
Louisa					
Franklin	25,922	25,918	1	25,922	25,918
Gloucester	25,327	25,279	1	25,327	25,279
Mathews					
Middlesex					
Grayson	22,640	22,634	1	22,640	22,634
City of Galax					
Greensville	28,562	28,558	1	28,562	28,558
Sussex					
Halifax	39,608	39,603	1	39,608	39,603
City of South Boston					
Hanover	35,100	35,081	1	35,100	35,081
King William					
Henrico	117,111	116,769	1	117,111	116,769
Henry	74,415	74,415	2	37,207	37,207
Patrick					
City of Martinsville					
Isle of Wight	60,949	60,864	1	60,949	60,864
Nansemond					
City of Suffolk					
Northumberland	36,769	36,759	1	36,769	36,759
Westmoreland					
Lancaster					
Richmond County					
City of Newport News	104,067	91,925	3	34,689	30,641
Lee	74,366	74,366	2	37,198	37,183
Wise					
City of Norton					
Loudoun	24,490	24,402	1	24,490	24,402
City of Lynchburg	54,759	54,713	1	54,759	54,713
Madison	36,171	36,165	1	36,171	36,165
Culpeper					
Orange					
Mecklenburg	31,428	31,428	1	31,428	31,428
Montgomery	42,253	42,192	1	42,253	42,192
City of Radford					

REPRESENTATION IN THE HOUSE OF DELEGATES EXCLUDING MILITARY PERSONNEL AND THEIR FAMILIES—Continued

House district	Total civilian population (1960)	Total population minus 2½ times the number of military personnel (1960)	Number of delegates	Civilian population per delegate	Population, less 2½ times the number of military personnel, per delegate
Nansemond City of Suffolk	43,890	43,763	1	43,890	43,763
Nelson Amherst	35,697	35,685	1	35,697	35,685
Norfolk County City of South Norfolk	72,516	70,820	2	36,258	35,410
City of Norfolk	261,491	194,920	6	43,582	32,487
Page Warren	30,220	30,210	1	30,220	30,210
City of Petersburg Dinwiddie	58,290	57,326	2	29,145	28,663
Pittsylvania City of Portsmouth	58,288 104,251	58,276 88,468	2 2	29,144 52,125	29,138 44,234
Prince George Surry City of Hopewell	38,702	30,178	1	38,702	30,178
Princess Anne City of Virginia Beach	73,967	58,596	2	36,983	29,297
Prince William	42,925	32,067	1	42,925	32,067
Pulaski	27,341	27,216	1	27,341	27,216
City of Richmond Henrico	336,870	336,280	8	42,109	42,029
Roanoke County City of Roanoke	61,652 97,035	61,591 96,923	1 2	61,652 48,517	61,591 48,461
Rockbridge Bath City of Buena Vista	35,636	35,579	1	35,636	35,579
Rockingham City of Harrisonburg	52,401	52,401	2	26,200	26,200
Shenandoah	21,817	21,805	1	21,817	21,805
Smyth	31,039	30,999	1	31,039	30,999
Southampton City of Franklin	27,195	27,195	1	27,195	27,195
Spotsylvania Stafford	43,264	42,409	1	43,264	42,409
City of Fredericksburg Tazewell	44,778	44,489	1	44,778	44,489
Washington Scott	81,008	80,971	2	40,504	40,485
City of Bristol Wythe	21,971	21,965	1	21,971	21,965
Total	3,533,867	3,444,344	100	35,339	34,443

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